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Public Prosecutor v Choo Soon Onn

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HIGH COURT (SHAH ALAM) — CRIMINAL APPEAL NO 42LB-7–02 OF 2015
ZULKIFLI BAKAR J
18 JANUARY 2017

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Criminal Law — Copyright Act 1987 — s 41(1)(d) — Respondent charged for offence under s 41(1)(d) of the Copyright Act 1987 for having in possession and using pirated copies of games — Whether element of 'reproduction' under the Act successfully proved by prosecution — Whether trial judge erred in receiving good faith defence by respondent

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On 27 October 2011, the police raided Envy Internet Café ('the cafe') which was managed by the respondent and found that 33 computers in the cafe used the same copy of CD for installation of games with titles of 'Warcraft III-Reign of Chaos' and 'Warcraft III-The Frozen Throne'. Consequently, the respondent was charged at the sessions court for the offence under s 41(1)(d) of the Copyright Act 1987 ('the Act'). The respondent was acquitted and discharged by the trial court, hence the present appeal by the prosecution. The police claimed that the respondent was using pirated copies of those two games. In response, the respondent contended that he bought two original CDs of the games from the agent of Sendi Mutiara Multimedia Sdn Bhd ('the company'), supported by the 'end user agreement' ('D24') in which the company had agreed to supply copies of and granting licenses and rights to use the PC games software to the cafe. It must be noted that D24 was signed by the respondent's brother ('DW2') who was illiterate. DW2 testified that he signed D24 without understanding its contents. DW2 further contended that he was informed by the agent of the company that there was no renewal of license needed to be done to the PC games software. The issues for consideration were whether the element of 'reproduction' under the Act was successfully proved by the prosecution; and whether the trial judge had erred in receiving 'good faith defence' by the respondent.

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Held, dismissing the appeal and affirming the decision of the learned trial judge:

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(1) 'Reproduction' is an act of copying the original work into some other material forms, but it did not fit into the instant fact that all 33 computers were installed by the original PC games software in which it might be otherwise if the CDs were not original sources but of duplicated copies (see para 12).

(2) By entering into D24, it was true that the cafe had gained access lawfully to the PC games under authority granted by the owner. It was ridiculous to say respondent had infringed the copyright as it was clearly stated in D24 where 33 computers involved which were claimed unlawfully accessed to the software were in fact within the range of the number of the PCs licensed to be used in the cafe which was '31–40'. Therefore, there was no breach of D24 by the respondent (see paras 14–15).

(3) Reasonable efforts were made by DW2, an illiterate person to specifically ask and verify with the agent during the signing of D24 whether there was any renewal required in future time. For an illiterate person, he had exercised due care and attention when making important enquiries of the content of D24 which was in English. In addition, the act of the respondent to make payment of RM34,200 for the PC games software clearly provided he had no reasonable grounds for supposing that the rights were given, subjected to certain condition. In totality, the plaintiff had proved, on balance of possibility that he acted in good faith and had no reasonable grounds for supposing that copyright or performers. Thus, he should be exonerated from the offence (see paras 25–27).

[Bahasa Malaysia summary

Pada 27 Oktober 2011, sepasukan polis telah menyerbu Envy Internet Café ('kafe tersebut') yang mana diuruskan oleh responden dan mendapati 33 komputer di kafe tersebut mengunakan salinan CD bagi pemasangan permainan komputer yang bertajuk 'Warcraft III-Reign of Chaos' dan 'Warcraft III-The Frozen Throne'. Akibatnya, responden didakwa di mahkamah sesyen bagi kesalahan di bawah s 41(1)(d) Akta Hakcipta 1987 ('Akta'). Responden dibebaskan dan dilepaskan oleh mahkamah perbicaraan, maka rayuan ini oleh pihak pendakwaan. Polis mendakwa bahawa responden menggunakan salinan cetak rompak kedua-dua permainan komputer tersebut. Dalam menjawab, responden berhujah bahawa dia membeli kedua-dua CD asal permainan tersebut daripada ejen Sendi Mutiara Multimedia Sdn Bhd ('syarikat tersebut'), disokong oleh 'end user agreement' ('D24') di mana syarikat tersebut telah bersetuju untuk membekalkan salinan dan memberikan lesen dan hak untuk mengunakan perisian permainan PC kepada kafe tersebut. Ia mesti diambil perhatian bahawa D24 ditandatangani oleh abang responden ('DW2') yang buta huruf. DW2 memberi keterangan bahawa dia menandatangani D24 tanpa memahami isi kandungannya. DW2 selanjutnya berhujah bahawa dia diberi tahu oleh ejen syarikat tersebut bahawa tidak terdapat pembaharuan lesen diperlukan untuk dilakukan kepada perisian permainan PC tersebut. Isu-isu untuk pertimbangan adalah sama ada unsur 'reproduction' di bawah Akta adalah dibuktikan dengan berjaya oleh pihak pendakwaan; dan sama ada hakim perbicaraan telah tersilap dalam menerima 'good faith defence' oleh responden.

Diputuskan, menolak rayuan dan mengesahkan keputusan hakim perbicaraan: A

(1) 'Reproduction' adalah satu tindakan menyalin kerja asal kepada bentuk material yang lain, tetapi ia tidak sesuai dengan fakta kes ini bahawa kesemua 33 komputer dipasang dengan perisian permainan PC asal di mana ia mungkin sebaliknya jika CD tersebut adalah bukan bahan asal tetapi adalah salinan (lihat perenggan 12). B

(2) Dengan menandatangani D24, ia adalah benar bahawa kafe telah mendapat akses secara sah kepada permainan PC di bawah kuasa yang diberikan oleh pemilik. Adalah tidak masuk akal untuk menyatakan responden telah melanggar hakcipta kerana ia jelas dinyatakan di dalam D24 di mana 33 komputer terlibat yang mana didakwa secara tak sah mengakses kepada perisian sebenarnya adalah dalam baris bilangan PC yang dilesenkan untuk digunakan di kafe tersebut yang mana adalah '31–40'. Oleh itu, tidak terdapat kemungkiran terhadap D24 oleh responden (lihat perenggan 14–15). C D

(3) Usaha munasabah dibuat oleh DW2, seorang yang buta huruf untuk menanya secara spesifik dan mengesahkan dengan ejen semasa menandatangani D24 sama ada terdapat pembaharuan yang diperlukan pada masa hadapan. Bagi seorang yang buta huruf, dia telah menjalankan sifat berhati-hati dan memberi perhatian semasa membuat pertanyaaan penting terhadap isi kandungan D24 yang mana adalah dalam Bahasa Inggeris. Selanjutnya, tindakan responden untuk membuat bayaran sebanyak RM34,200 untuk perisian permainan PC jelas menunjukkan dia tidak mempunyai alasan yang munasabah untuk mengandaikan bahawa hak telah diberi, tertakluk kepada syarat tertentu. Secara keseluruhannya, plaintif telah membuktikan, atas imbangan kemungkinan bahawa dia telah bertindak dengan suci hati dan tidak mempunyai alasan munasabah untuk mengandaikan hakcipta atau pelaku. Oleh itu dia patut dilepaskan daripada kesalahan tersebut (lihat perenggan 25–27).] E F G

Notes

For cases on s 41(1)(d), see 4(1) *Mallal's Digest* (5th Ed, 2015) paras 188–190. H

Cases referred to

Davidson & Assocs v Internet Gateway 334 F Supp 2d 1164 (refd)

Megnaway Enterprise Sdn Bhd v Soon Lian Hock (sole proprietor of the firm Performance Audio & Car Accessories Enterprise) [2009] 3 MLJ 525, HC (refd) I

Peko Wallsend Operations Ltd & Ors v Linatex Process Rubber Bhd and another action [1993] 1 MLJ 225, HC (refd)

PP v Yuvaraj [1969] 2 MLJ 89, PC (refd)

A *R v City of Sault Ste Maria* [1978] 2 SCR 1299, SC (folld)
Tan Khee Wan Iris v PP [1995] 2 SLR 63, HC (refd)

Legislation referred to

Copyright Act 1987 ss 3, 41(1), (1)(d)
B Penal Code s 52
Public Entertainments Act (Cap 257) s 18(1)(a)

Lokman bin Kasim (Deputy Public Prosecutor, Selangor State Legal Office) for the appellant.
C *Kulasegaran a/l SA Shunmugam (S Kula & Co) for the respondent.*

Zulkifli Bakar J:

BACKGROUNDS

D

[1] At the sessions court, the respondent was charged under s 41(1)(d) of the Copyright Act 1987 as follows:

Charge:

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> Bahawa kamu pada 27 Oktober 2011 di Eenvy Internet Cafe beralamat di No 9A, Jalan Damai 2, Taman Damai Jaya, Batu 9 Cheras, 43100 Kajang, dalam daerah Kajang di negeri Selangor Darul Ehsan, telah didapati memiliki bukan untuk tujuan kegunaan persendirian dan domestic, dua salinan karya dalam bentuk permainan computer yang bertajuk Warcraft III-Reign of Chaos dan
F Warcraft III-The Frozen Throne, tatkala hakcipta wujud dan masih wujud bagi syarikat Blizzard Entertainment Inc dan dengan itu kamu telah melakukan satu kesalahan di bawah seksyen 41(1)(d) Hakcipta 1987 yang boleh dihukum di bawah seksyen 41(1)(i) akta yang sama.

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[2] Previously, the sessions court judge had ruled the respondent to be acquitted and discharged without calling for defence at the close of the prosecution's case. Deputy public prosecutor, being dissatisfied with the decision, appealed to High Court and subsequently the High Court judge, on
H last 5 May 2014 under Case No 42S-197–06 of 2012, decided the respondent to enter his defence before the same trial judge.

[3] It is to be noted in the present case, this is an appeal by the public prosecutor ('the appellant') against the order made by the learned sessions court
I judge who acquitted and discharged the respondent at the end of defence's stage.

[4] Briefly, the facts of the case are as follows:

(a) on 27 January 2011, Mohd Syafiq Jinun, multimedia crime supervisor at commercial crime investigation department Bukit Aman ('PW1') led the team to raid Envy Internet Café ('café'). On the material date, one Chinese man known as 'Chan Wai Hong' was found taking care of the premise of the café;

(b) inspection was conducted by Lim Guan Hock, a computer technician of Sendi Mutiara Multimedia Sdn Bhd ('PW4') who followed PW1 to the café and found 34 computers in the café comprised with two copies of computer game works with titles of 'Warcraft III-Reign of Chaos' and 'Warcraft III-The Frozen Throne' ('PC games'), as stated in the charge; and

(c) the prosecution alleged that it was an offence when all these 33 computers used the same copy of CD for installation of each game to be played. Datuk Lim Mok Guan, President of Sendi Mutiara Multimedia Sdn Bhd ('PW6') testified that the respondent did not obtain commercial licence for installation of the two CDs at the café and failed to get the permission in respect of its copyright.

[5] At the defence stage, there were two witnesses on behalf of the defence were called, ie the responden ('DW1') and his brother, Choo Soon Fook ('DW2').

[6] The defence's case is summarised as follows:

(a) the respondent ('DW1') was the manager of the café. On day of the incident, the respondent was informed by 'Chan Wei Hong' that police had led a team to raid the café and thereafter the respondent went to the café;

(b) the police claimed that the respondent was using pirated copies of those two games. The respondent then explained to the police that he bought two original CDs of the games (D25(a) and D25(b)) from the agent of Sendi Mutiara Multimedia Sdn Bhd (Sam Thneah), supported by the 'end user agreement' (D24) in which the company Sendi Mutiara Multimedia Sdn Bhd had agreed to supply copies of and granting licences and rights to use the PC games software to the café; and

(c) DW2 gave evidence that he was illiterate and thus he signed D24 without understanding its contents. However, DW2 contended that he was informed by the agent of Sendi Mutiara Multimedia Sdn Bhd (Sam Thneah) that there was no renewal of licence needed to be done to the PC games software.

AT THE APPEAL IN THIS COURT

[7] Throughout the hearing of this appeal, the appellant raised two issues before this court:

(1) whether the element of 'reproduction' under the Copyright Act 1987 was successfully proved by the prosecution; and

(2) whether the trial judge had erred in receiving 'good faith defence' by the respondent.

Issue (1): Whether the element of 'reproduction' under Copyright Act 1987 was successfully proved by the prosecution

[8] Deputy public prosecutor submitted that the learned trial judge failed to interpret the real meaning of 'reproduction' under s 3 of the Copyright Act 1987 since the respondent used the same CD key of one CD to install the copies in all 33 computers at the café as the correct procedure was every computer must be installed by different CD keys:

(a) in this regards, deputy public prosecutor said that, although the two CDs were original but they became 'infringed copies' when being installed in the computers of the café without the consent of the Sendi Mutiara Multimedia Sdn Bhd, ie the owner of the copyright of the PC games softwares; and

(b) deputy public prosecutor also alleged that the respondent did not have licence to use the said PC games software for commercial purpose and from D24 agreement, licence of the respondent only lasted until 31 December 2006 and there was no further evidence to show the respondent had ever made any application for renewal or received other licence thereon.

[9] I shall deal first with the definition of 'reproduction' under s 3 of the Copyright Act 1987, and reproduced below for ease of reference:

> 'reproduction' means the making of one or more copies of a work in any form or version, and in relation to an artistic work includes the making of a copy in three dimensions of a two-dimensional work and the making of a copy in two dimensions of a three-dimensional work, and reproducing shall be construed accordingly.

[10] Prior to the amendment of Copyright Act in 1996, there was no express definition of 'reproduction' in the Act. Nevertheless, definition of 'reproduction' had been dealt with in the case of *Peko Wallsend Operations Ltd & Ors v Linatex Process Rubber Bhd and another action* [1993] 1 MLJ 225, as expressed by Siti Norma J (as she then was) in which suggested the infringement was not restricted to 'direct' copying:

> [s]ince the Act makes direct copying an infringement, *it is only right and proper that indirect copying is also an infringement,* as to conclude otherwise would go against the intention of the legislature in enacting the Act as it did. (Emphasis added.)

[11] The definition of 'reproduction' which was stated in *Peko Wallsend*'s case, till to date, is still considered as a good law. My analysis on the 'reproduction' is fundamentally on the 'objective similarities' (not an act of direct copying) which must be present between two works, the converted and the original, before concluding a work is 'copied' from another. This court refers to the case of *Megnaway Enterprise Sdn Bhd v Soon Lian Hock (sole proprietor of the firm Performance Audio & Car Accessories Enterprise)* [2009] 3 MLJ 525, as held by Low Hop Bing J (as he then was):

> *It must be established that there is sufficient objective similarity between the original work and a substantial part of thereof, and the infringing copy.* In the following paragraph, the matter is made clearer by the learned judge in *Megnaway Enterprise Sdn Bhd v Soon Lian Hock (sole proprietor of the firm Performance Audio & Car Accessories Enterprise):*
>
> > *There could be infringement even though the imitation is not an exact replica. It does not matter whether the size of the copy has been increased or reduced, or whether the whole or part of the original was copied. There need not be an exact reproduction, but there must be a high degree of similarity between the two: AUVI Trademark, per Chao Hick Tin J.*
> >
> > In copyright law, once substantial similarity is established, a prima facie presumption of copying by the defendant arises and the burden is shifted to the defendant to rebut the causal connection. Where the defendant has failed to rebut this presumption, the second element is fulfilled. (Emphasis added.)

[12] In my considered judgment, pursuant to the above, 'reproduction' is referred to an act of copying the original work into some other material forms, but it does not fit into the instant fact that all 33 computers were installed by the original PC games software in which it might be otherwise if the CDs were not original sources but of duplicated copies.

[13] Notably, in the present case, it involves the issue of 'CD Key'. CD key is the password printed somewhere on the packaging to grant the user's right to access to software he purchased, in which it has been defined by United States District Court For The Eastern District Of Missouri, Eastern Division in the case of *Davidson & Assocs v Internet Gateway* 334 F Supp 2d 1164 at p 1169:

> *B. Technology of the Battle.net Service*
>
> Blizzard's games are shipped to customers on CD-ROM disks. Except for the game 'Diablo', *each authorized version of a Blizzard game comes with a 'CD Key', a unique sequence of alphanumeric characters that is printed on a sticker attached to the case in which the CD-ROM was packaged. The user of the game must input the CD Key into*

his or her computer when installing the game, and it is subsequently stored on the computer for use in logging on to the Battle.net service. The Battle.net service prohibits use of unauthorized or pirated copies of Blizzard games with the Battle.net service.

To log on to the Battle.net service and access Battle.net mode, the game initiates a authentication sequence or 'secret handshake' between the game and Battle.net server. First, the game and Battle.net server exchange random numbers (one provided by the game and one provided by the server). *The game then takes the random numbers, as well as information from the CD Key, and calculates an encrypted alphanumeric sequence which is sent to the Battle.net server.* The game performs this encryption to prevent individuals from stealing the game's CD Key when it is transmitted over the Internet to a Battle.net server. The Battle.net server receives the alphanumeric sequence sent by the game, along with other information sent by the game, and uses this data to determine whether the CD Key information sent by the game is valid. *If the CD Key information is valid, the Battle.net server will determine whether the same CD Key is already being used by another game that is currently logged on to that Battle.net server gateway. If the CD Key is both valid and not currently being used by other players on the same Battle.net gateway, the Battle.net server sends a signal to the game that allows the game to enter the Battle.net mode and use the Battle.net gaming services*. The Blizzard game waits for this signal before entering Battle.net mode. Battle.net uses an encryption algorithm for this process based on a common encryption algorithm. The standard version of this algorithm was released by the United States government. (Emphasis added.)

[14] This court found that by entering into 'End User License Agreement' (D24), it is true that the respondent's café had gained access lawfully to the PC games under authority granted by the owner. This court refers again to the case of *Davidson & Assocs* in relation to the functionality of the 'End User License Agreement' as follows:

C. End User License Agreements ('EULA') and Battle.net Terms of Use ('TOU')

In order to play the Blizzard game contained on a CD-ROM, a user must first install the game onto a computer from the CD-ROM. First, the user inserts the CD-ROM into his or her computer. A menu pops up automatically, and the user chooses to install the game from that menu. Second, the user is presented with the terms of an End User License Agreement [*1170] ('EULA'). At the end of the EULA, Blizzard includes a button with the text, 'I Agree' in it, which the user must click in order to proceed with the installation. The game will not work if the 'I Agree' button is not selected. Third, the user is asked to enter a name and the CD Key. Fourth, the user is asked to choose where on his or her computer the program's files should be installed. The files are then installed at the chosen location. Finally, the user is offered the opportunity to register his or her copy of the game with Blizzard via an on-line registration process. After the user has finished registering his copy, or if he or she chooses not to register, the installation process is complete.

Blizzard's Battle.net service has a Terms of Use ('TOU'), which Blizzard presents to users when they first log onto the Battle.net service. First-time users of the Battle.net service are shown the terms of the Battle.net service TOU after a user has installed a Blizzard game and logs onto the Battle.net service for the first time to play with a purchased Blizzard

game product. At the end of the TOU, Blizzard includes a button with the text, 'Agree' in it, which the user must click before the Battle.net service can be used. The product will not work with the Battle.net service if the 'Agree' button is not selected.

For every game at issue in this litigation except for Diablo, the outside packaging of the game states that use of the game is subject to a EULA, and that use of Blizzard's Battle.net service is subject to the Battle.net TOU. The terms of the EULAs and TOU themselves do not appear on the outside packaging. If the user does not agree to the terms of Blizzard's EULAs or Battle.net TOU, he or she may return the game for a full refund of the purchase price within thirty (30) days of the original purchase. The EULA contains the following language:

> YOU SHOULD CAREFULLY READ THE FOLLOWING END USER LICENSE AGREEMENT BEFORE INSTALLING THIS SOFTWARE PROGRAM. BY INSTALLING, COPYING, OR OTHERWISE USING THE SOFTWARE PROGRAM YOU AGREE TO BE BOUND BY THE TERMS OF THIS AGREEMENT. IF YOU DO NOT AGREE TO THE TERMS OF THIS AGREEMENT, PROMPTLY RETURN THE UNUSED SOFTWARE PROGRAM TO THE PLACE OF PURCHASE OR CONTACT BLIZZARD ENTERTAINMENT CUSTOMER SERVICE . . . FOR A FULL REFUND OF THE PURCHASE PRICE WITHIN THIRTY DAYS OF THE ORIGINAL PURCHASE.

(Pls.' Ex. 8). The EULA further states 'subject to the grant of license hereinabove, you may not, in whole or in part, copy, photocopy, reproduce, translate, reverse engineer4, derive source code4, modify, disassemble, decompile, create derivative works5 based on the Program, or remove any proprietary notices or labels on the program without the prior consent, in writing, of Blizzard.' Id. The EULA also states that it 'shall have been deemed to have been made and executed in the State of California and any dispute arising hereunder shall be resolved in accordance with the law of California.' Id. (Emphasis added.)

[15] After close analysis on the agreement (D24), the most paramount consideration is the terms and conditions stated in the agreement. Through the said agreement, Sendi Mutiara Multimedia Sdn Bhd agreed to supply copies of and granting licenses and rights to use the PC games softwares to the end user (the person who bought the softwares ie the Envy Internet Café) subject to the terms and conditions, for instance issue in regards with the license scheme as disputed in the present case, which are thereafter stipulated in Schedule 3 as follows:

SCHEDULE 3 PLAN CATEGORY/LICENSE SCHEME

No	Plan Category	Monthly Purchase/ License Fee	No of CD-Roms/ CD-Keys provided	Maximum No of PCs licensed
A	ALPHA	RM1,350.00	5	1 – 20
A1	A11	RM1,650.00	6	21 – 30

No	Plan Category	Monthly Purchase/ License Fee	No of CD-Roms/ CD-Keys provided	Maximum No of PCs licensed
B	BETA	RM2,350.00	9	31 – 40
C	GAMMA	RM3,150.00	14	41 – 60
D	DELTA1	RM3,850.00	19	61 – 80
E	SUPER**	Negotiable	Negotiable	Above 80

** For plan category SUPER, the figure for 'Monthly Purchase/License Fee' and 'No of CD-Roms/CD-Keys provided' shall be soleny determined by SMM (Sendi Multiara Multimedia) from time to time and any agreement between the parties for the same shall be added to this Agreement by way of an addendum without prejudice or derogation to the other terms of this Agreement. The remaining terms of this Agreement shall apply to the END USER.

(a) the respondent opted the license scheme 'B' which would have obtained nine CD-Keys and maximum no of PCs licensed was '31–40'. This court found that it was ridiculous to say the respondent had infringed the copyright as it was clearly stated in the agreement where '33 computers' involved which were claimed unlawfully accessed to the software were in fact within the range of the number of the PCs licensed to be used in the café; and

(b) in this connection, this court found that there was no breach of the license agreement by the respondent and therefore there was no merit and baseless to argue on this aspect relating to the copyright of using 'CD-Keys' at the first instance.

[16] In my view, 'reproduction' as such was not an issue in this case, rather that it is therefore clearly to highlight the learned trial judge had correctly addressed the issue about the respondent did not renew such license and hence was alleged by the prosecution that the respondent had done an infringing act by remaining to perform the PC games without the authority of the copyright owner. The defence had been rightly called. In this context, the respondent raised 'good faith defence' to argue that he had acted in good faith and had no reasonable grounds for supposing that copyright of the PC games would or might thereby be infringed which become second issue to be canvassed herein.

Issue (2): Whether the trial judge had erred in receiving 'good faith defence' by the respondent

[17] The learned trial judge accepted 'good faith defence' by the respondent in which SD2 was informed by the agent that there was no renewal of licence required when signing D24 agreement. The prosecution alleged that a reference was made to D24 and the licence of the respondent would last only

until 31 December 2006 and subsequently the respondent failed to make any application for renewal of the license, thus the respondent thereon was using 'infringing copy' of the PC games softwares. However, the respondent provided the affirmation that he would not have allowed the use of 'infringing copy' had he knew it.

[18] In this occasion, this court had considered the evidence by PW6 during examination-in-chief in relation to the measures for the renewal of license of the softwares:

> Q: End user agreement itu, adakah mempunyai satu jangka masa tertentu?
>
> A: End user agreement ini adalah year to year, dia akan tamat pada tempoh 31 haribulan Disember dalam tahun-tahun yang berkaitan.
>
> Q: Sekiranya ada pelanggan yang ingin membaharui lesen tersebut, apakah prosedur yang perlu dipatuhi?
>
> A: *Ada dua cara, cara pertama pelanggan sendiri akan meminta kebenaran untuk memperbaharui lesen atau cara kedua kita akan pergi jumpa dia untuk tanya dia sama ada dia mahu membaharui atau tidak mahu*. Jika dia tak mahu membaharui, dia tidak akan dibenarkan menggunakan perisian ini lagi, akan disinstall dari cyber café dia. (Emphasis added.)
>
> – p 80, record of appeal, Vol 1.

[19] In spite of that, this court decided in favour of the respondent where the respondent successfully adopted the defence of 'good faith' under s 41(1)(d) of the Copyright Act 1987 as stated in the charge against the respondent. At this juncture, it is appropriate to reproduce the relevant section as follows:

> 41 Offences
>
> (1) Any person who during the subsistence of copyright in a work or performers' right —
>
> ...
>
> *(d) has in his possession, custody or control, otherwise than for his private and domestic use, any infringing copy*;
>
> ...
>
> *shall, unless he is able to prove that he had acted in good faith and had no reasonable grounds for supposing that copyright or performers' right would or might thereby be infringed, be guilty of an offence and shall on conviction be liable —*
>
> (i) in the case of an offence under paragraphs (a) to (f), to *a fine of not less than two thousand ringgit and not more than twenty thousand ringgit for each infringing copy, or to imprisonment for a term not exceeding five

years or to both and for any subsequent offence, to **a fine of not less than four thousand ringgit and not more than forty thousand ringgit for each infringing copy or to imprisonment for a term not exceeding ten years or to both;

(ii) in the case of an offence under paragraphs (g) and (ha), to ***a fine of not less than four thousand ringgit and not more than forty thousand ringgit for each contrivance in respect of which the offence was committed or to imprisonment for a term not exceeding ten years or to both and for any subsequent offence to +a fine of not less than eight thousand ringgit and not more than eighty thousand ringgit for each contrivance in respect of which the offence was committed or to imprisonment for a term not exceeding twenty years or to both;

(iii) in the case of an offence under paragraphs (h), (i) and (j), to ++a fine not exceeding two hundred and fifty thousand ringgit or to imprisonment for a term not exceeding five years or to both and for any subsequent offence, to a fine not exceeding five hundred thousand ringgit or to imprisonment for a term not exceeding +++ten years or to both. (Emphasis added.)

[20] Upon reading the above s 41(1)(d) of the Copyright Act 1987, this court found that possession of infringing copy ('infringing copy' as defined under s 3 of the same Act) for any purpose is an offence unless he can justify that the copy was used for his private and domestic use or alternatively he can prove that he 'had acted in good faith and had no reasonable grounds for supposing that copyright would or might thereby be infringed'.

[21] It seems to me that this is a strict liability offence where the prosecution need not prove that the respondent had the requisite guilty mind that he was in possession of the infringing copy of the PC games softwares in the course of trade and it would be the onus on the respondent to disprove the element of mens rea on a balance of probabilities. This court relied on the case of *R v City of Sault Ste Maria* [1978] 2 SCR 1299, illustrated by Supreme Court of Canada as a guidance to the nature of 'strict iability offence' (the second category) as follows:

> Three categories of offences are therefore now recognised (first) offences in which mens rea must be established, *(second) offences of 'strict liability' in which mens rea need not be established but where the defence of reasonable belief in a mistaken set of facts or the defence of reasonable care is available*, and (third) offences of 'absolute liability' where it is not open to the accused to exculpate himself by showing that he was free of fault. Offences which are criminal are in the first category. Public welfare offences are prima facie in the second category. Absolute liability offences would arise where the legislature has made it clear that guilt would follow on mere proof of the proscribed act. (Emphasis added.)

[22] It is of interest to note 'good faith' defence as explained in s 52 of the Penal Code for reference. This is what 'good faith' being interpreted in

Malaysian position:

> Nothing is said to be done or believed in good faith which is done or believed *without due care and attention*. (Emphasis added.)

[23] I am therefore of the opinion it is necessary to comprehend the defence of 'good faith' in the way which is made with 'due care and attention'. It has been illustrated in the case of *Tan Khee Wan Iris v Public Prosecutor* [1995] 2 SLR 63 where the appellant was charged under s 18(1)(a) of the Public Entertainments Act in providing public entertainment without a licence in the early hours of 1 January 1994. Due to an oversight, one part of the licence stated that it was valid until 6am on 1 January 1994 while another part stated that it was only valid until 31 December 1993. In his opinion, Yong Pung How CJ (as he then was) said on the application of 'good faith':

> However, it is not enough for the appellant to show that she was mistaken. She must also show that she believed in good faith that she had a valid licence for the relevant period. *The test of whether a mistake was made in good faith is not whether the mistake was an easy one to make nor whether a reasonable person could make the mistake. The test is that laid down in s 52 of the Penal Code. The test is whether there was due care and attention. The mistake may be a natural one to make and it may be one which reasonable persons often make. Nevertheless, the defence is not made out unless it is shown on a balance of probabilities that the appellant exercised due care and attention.* Thus, it is not enough to show that the licensing officer or even the prosecution made the same mistake. All that shows is that it was a reasonable mistake to make. *In order to succeed, the appellant must still show that she exercised due care and attention*. No doubt in many cases the fact that a reasonable person made the same mistake will go some way towards discharging the burden of showing due care and attention, but that is not the same thing. (Emphasis added.)

[24] Other than 'good faith factor', it is also necessary for me to evaluate and assess 'no reasonable grounds for supposing that copyright or performers' under s 41(1) of the Copyright Act 1987 when considering the test of applicability of such defence. In my reading on a plain and literal construction, it indicates the respondent has believed something to be true and does not question the possibility that the belief might be wrong.

[25] In my considered judgment, it seems to me to be quite clear and I am satisfied that reasonable efforts were made by DW2, an illiterate person to specifically ask and verify with the agent during the signing of the D24 agreement albeit whether there is any renewal required in future time. Upon case-by-case basis, to an illiterate person like DW2 who only studied until Form 2, he had exercised due care and attention when making important enquiries of the content of the agreement which is in English. This can be seen during cross-examination:

Q:	Sebagai partner kamu berdua tahu melalui D24 yang perjanjian ini perlu direnew setiap tahun.
A:	Tidak setuju, sebab apa yang saya faham tak perlu renew.
Q:	Daripada mana kamu tahu pasal tak perlu renew.
A:	*Ejennya yang bagitahu saya.*
Q:	Ejen itu ada semasa D24 ditandatangani.
A:	Ya. (Emphasis added.)

[26] There is one further point which I would like to address. Based on the observation in the present case, the act of DW1 to make payment of RM34,200 for the PC games softwares clearly provided he had no reasonable grounds for supposing that the rights are given, subjected to certain condition. Besides, if according to the evidence by PW6 on two alternatives that the representative from Sendi Mutiara Multimedia had come and asked the respondent to renew the license but he refused so, it would operate to negate the applicability of defence. However be that as it may, it is an example of such a matter.

[27] After considering the evidences as above, this court found that the respondent has proved, on a balance of possibility, that he acted in good faith and had no reasonable grounds for supposing that copyright or performers (*Public Prosecutor v Yuvaraj* [1969] 2 MLJ 89). Thus, he should be exonerated from the offence.

CONCLUSION

[28] Accordingly, in the light of the foregoing reasons, this appeal is hereby dismissed. I affirm the decision of the learned trial judge in acquitting and discharging the respondent from the charge.

Appeal dismissed; decision of learned trial judge affirmed.

Reported by Dzulqarnain Ab Fatar